

EXECUTIVE OFFICER SUMMARY REPORT
December 11, 2002

ITEM: 11

SUBJECT: **PUBLIC HEARING:** Administrative Assessment for Civil Liability containing a Mandatory Penalty against Fallbrook Public Utility District (Fallbrook PUD) for Violation of Order No. R9-2000-0012, NPDES Permit No. CA0108031, *Waste Discharge Requirements for the Fallbrook Public Utility District, Wastewater Treatment Plant No. 1, Discharges to the Pacific Ocean via the Oceanside Ocean Outfall*. If the discharger elects to waive their right to a hearing, the matter will be rescheduled to allow for a 30-day public review period at which time the Regional Board will consider assessment of civil liability. (Tentative Order No. R9-2002-0383 [*Document No. 2*]) (*Frank Melbourne*)

PURPOSE: To accept testimony from Fallbrook Public Utility District, Regional Board staff, and the public regarding the allegations and recommendations of civil liability in Complaint No. R9-2002-0308 (*Document No. 3*) prior to deciding whether to adopt Tentative Order No. R9-2002-0383.

PUBLIC NOTICE: The public and the Discharger were noticed of the hearing in the Agenda Notice for today's meeting that was distributed on November 22, 2002, and by posting on the Regional Board web site.

DISCUSSION: Fallbrook PUD violated Order No. R9-2000-0012 thirty-one times from April 2001 through June 2002. These violations were due to effluent limit exceedances of Total Suspended Solids (TSS) and Carbonaceous Biochemical Oxygen Demand (CBOD₅) as reported in Fallbrook PUD's Self-Monitoring Reports (SMRs) during this time period. Table 1 of Complaint No. R9-2002-0308 details each violation and whether a Mandatory Minimum Penalty (MMP) applied. Fallbrook PUD was notified by the Regional Board after submitting each SMR that these violations were subject to MMPs under Water Code section 13385. (*Document Nos. 4-10*)

Fallbrook PUD's General Manager, Keith Lewinger has requested a hearing to claim that the violations cited for the mandatory minimum penalty have been a result of a number of "single operational upsets." (*Document No. 11*)

LEGAL CONCERNS:

Are the alleged violations a result of a “single operational upset?” Water Code section 13385(f) states that a single operational upset that leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation. Water Code section 13385(f) applies to determining penalties under section 13385(h) and (i). Therefore, for purposes of section 13385(h) and (i), simultaneous exceedances of more than one effluent limitation due to a single operational upset would be considered one violation. Section 13385(f) reads the same as Clean Water Act section 309(c)(5) [33 U.S.C. section 1319(c)(5)], and it is appropriate for the Regional Board to interpret section 13385(f) in accordance with federal law and the attendant regulations established by U.S. EPA. For purposes of that provision, U.S. EPA in its guidance defines **“single operational upset”** as

“an exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. Single operational upset does not include ... noncompliance to the extent caused by improperly designed or inadequate treatment facilities.” (See U.S. EPA Guidance Interpreting “Single Operational Upset”)

This U.S. EPA Guidance further defines an “exceptional” incident as a “nonroutine malfunctioning of an otherwise generally compliant facility.” For example, if a facility has had a history of violations due to excess flows during wet weather events, the single operational upset provision may not apply to such violations.

A decision by the United States Court of Appeals for the Third Circuit further interprets the “single operational upset” provision. *See Public Interest Research Group of New Jersey, Inc. et al. v. Powell Duffryn Terminals Inc.* (3d Cir. 1990) 913 F.2d 64. The Court considered a “single operational upset” to mean such things as upsets caused by a sudden violent storm, a bursting tank, or other exceptional event, not operational upsets caused by improperly operated or designed facilities. The Court determined that the “single operational upset” provision applies to the determination of the amount of the liability or penalty; it is not a defense to liability. The “single operational upset” provision differs from the “upset” defense provided by U.S. EPA’s regulations in 40 CFR section 122.41(n). That “upset” defense may be raised as an affirmative

defense to liability and the discharger must meet certain requirements, including reporting the incident within 24 hours.

Merely because more than one effluent limitation is violated does not mean that a "single operational upset" occurred. The discharger has the burden of demonstrating that a "single operational upset" occurred. The discharger must show that the violations were the result of a specific cause, and that the cause qualifies as an upset. See *Powell Duffryn*, 913 F.2d at 76; *U.S. v. Gulf States Steel, Inc.* (N.D. Ala. 1999) 54 F.Supp.2d 1233, 1248.

As of November 25, 2002, Fallbrook PUD has not submitted any evidence to support a finding of a "single operational upset."

If the Regional Board determines that a single operational upset event has occurred, all exceedances on any single day that are attributable to that event will be counted as only one exceedance for the purpose of calculating mandatory penalties. If the exceedances attributable to the same event continue for two days, two exceedances will be counted, and so on, in accordance with U.S. EPA's Guidance. However, the "single operational upset" provision should not be used for subsequent days where the discharger fails to take immediate remedial steps and thereby allows the noncompliance to continue over an extended period. See *Gulf States Steel*, 54 F.Supp.2d at 1247.

SUPPORTING
DOCUMENTS:

1. Location Map
2. Tentative Order No. R9-2002-0383
3. Complaint No. R9-2002-0308, including cover letter
4. Regional Board SMR Receipt letter, August 17, 2001
5. Fallbrook PUD April 2001 SMR, May 29, 2001
6. Fallbrook PUD May 2001 SMR, June 28, 2001
7. Regional Board SMR Receipt letter, November 19, 2001
8. Fallbrook PUD September 2001 SMR, October 22, 2001
9. Regional Board SMR Receipt letter, September 30, 2002
10. Fallbrook PUD June 2002 SMR, July 29, 2002
11. Fallbrook PUD letter to Regional Board, November 15, 2002
12. Regional Board letter, November 25, 2002
13. Fallbrook PUD letter to Regional Board, November 26, 2002

RECOMMENDATION: Adopt Tentative Order No. R9-2002-0383.